

Re: Elizabethtown Landfill
Ref: CERCLA

DECISION DOCUMENT
PREAUTHORIZATION OF A CERCLA SECTION 111(a) CLAIM

ELIZABETHTOWN LANDFILL SUPERFUND SITE
LANCASTER COUNTY, PENNSYLVANIA

I. STATEMENT OF AUTHORITY

Section 111 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9611, authorizes the reimbursement of response costs incurred in carrying out the National Contingency Plan, 40 C.F.R. Part 300 (as amended) (NCP). Section 112 of CERCLA, 42 U.S.C. § 9612 directs the President to establish the forms and procedures for filing claims against the Hazardous Substance Superfund (Superfund or Fund). Executive Order 12580 (52 Fed Reg. 2923, January 29, 1987) delegates to the Administrator of the Environmental Protection Agency (EPA) the responsibility for CERCLA claims and for establishing forms and procedures for such claims. The forms and procedures can be found in the Response Claims Procedures for the Hazardous Substance Superfund, 40 C.F.R. Part 307, 58 Fed. Reg. 5460 (January 21, 1993). Executive Order 12580 also delegates to the EPA Administrator the authority to reach settlements pursuant to Section 122(b) of CERCLA, 42 U.S.C. § 9622(b). The Director of the Office of Emergency and Remedial Response (OERR) is delegated authority to evaluate and make determinations regarding claims (EPA Delegation 14-9, September 13, 1987 and EPA Redelegation 14-9 "Claims Asserted Against the Fund," May 25, 1988).

II. BACKGROUND ON THE SITE

On October 1, 1997, Abraham Ferdas, Director of the Hazardous Site Clean-up Division for Region III, signed the Record of Decision (ROD) for the Elizabethtown Landfill Superfund Site (hereinafter referred to as the Site). The overall objectives of the remedy are to control buried waste, leachate, contaminated ground water and contaminated surface water at the Site. The remedy also provides for capping the uncapped portion of the Landfill, monitoring of five residential wells, and two public water supply wells, along with the requirement that an alternate source of drinking water or treatment shall be provided for any of these wells in which EPA determines that contaminants attributable to the Landfill are found which exceed action levels, conducting a predesign study of the ground water and surface water, and the construction of a groundwater extraction well system. The ROD also includes the following language. Provided, however, that if after the Landfill cap is installed the predesign ground water and surface water study described above demonstrates that the ground water and surface water cleanup levels set forth in this ROD can be attained within a reasonable time period, as determined by EPA, without extraction and treatment of ground water, then EPA will modify the ROD to eliminate the requirement for such extraction and treatment in accordance with CERCLA and the NCP.

On May 21, 1998, Special Notice Letters were sent to Furnival Machinery Company, Heritage Metal Finishing, Inc., New Standard Corporation, National-Standard Company, Commonwealth of Pennsylvania, Ginder Cleaners, Inc., Waste Management Disposal Services of Pennsylvania, Inc. ("Waste Management"), Harold and Cleora Shank, Jay Myers, AMP, Inc., and Wyeth-Ayerst Laboratories. Since the date of Special Notice, EPA has reached *diminimis* settlement agreements with the Commonwealth of Pennsylvania and National-Standard Company. Good faith offers were originally due on July 29, 1998, but that date was extended by EPA until December 7, 1998. On December 7, 1998, EPA received a good faith offer from Waste Management. Furnival Machinery Company, Wyeth-Ayerst Laboratories, and New Standard Corporation also submitted offers to participate in the Remedial Design and Remedial Action.

On February 24, 1999, the Waste Management submitted a formal application for preauthorization as required by Section 300.700(d) of the NCP and 40 C.F.R Section 307.22.

III. **FINDINGS**

Preauthorization (i.e., EPA's prior approval to submit a claim against the Superfund for reasonable and necessary response costs incurred as a result of carrying out the NCP) represents the Agency's commitment to reimburse a claimant from the Superfund, subject to any maximum amount of money set forth in this PDD, if the response action is conducted in accordance with the preauthorization and costs are reasonable and necessary. Preauthorization is a discretionary action by the Agency taken on the basis of certain determinations.

EPA has determined, based on its evaluation of relevant documents and Waste Management's Application for Preauthorization (Application) pursuant to 40 C.F.R. Section 300.700(d) that:

- (A) A release or potential release of hazardous substances warranting a response under Section 300.435 of the NCP exists at the Site;
- (B) Waste Management agreed to implement the remedy selected by the EPA to address the threat posed by the release at the Site;
- (C) Waste Management has demonstrated engineering expertise and a knowledge of the NCP and attendant guidance;
- (D) The activities proposed by Waste Management, when supplemented by the terms and conditions contained herein, are consistent with the NCP; and
- (E) Waste Management has demonstrated efforts to obtain the cooperation of the Commonwealth of Pennsylvania.

EPA has determined, consistent with 40 C.F.R. Section 307.23, that the Application submitted by Waste Management demonstrates a knowledge of relevant NCP provisions, 40 C.F.R. Part 307, and EPA guidance sufficient for the conduct of a Remedial Action at the Site.

Waste Management is generally obligated to comply with all provisions and representations in the Application for Preauthorization, and to notify EPA of any changed circumstances which alter those provisions. If circumstances change between the time the Application is submitted, and the time of remedy implementation, it is in EPA's discretion to determine which Application provisions are still valid and which provisions no longer apply. The Consent Decree, including the terms and conditions of the PDD, the ROD, and the Performance of the Work by Waste Management shall govern the conduct of response activities at the Site. In the event of any ambiguity or inconsistency between the Application for Preauthorization and this PDD, with regard to claims against the Fund, the PDD and the Consent Decree shall govern. In the event of any inconsistency between the PDD and the Consent Decree, the Consent Decree shall govern.

IV. PREAUTHORIZATION DECISION

I preauthorize Waste Management to submit a claim(s) against the Superfund for up to 25% of the costs incurred in completing the Remedial Action/Remedial Design in accordance with the Consent Decree and this Preauthorization Decision Document. In no event shall Waste Management's approved claim(s) against the Fund exceed the sum of \$1,125,000. This preauthorization is subject to compliance with the Consent Decree and the provisions of this PDD.

V. AUDIT PROCEDURES

Waste Management shall develop and implement audit procedures which will ensure their ability to obtain and implement all agreements to perform preauthorized response actions in accordance with sound business judgment and good administrative practice as required by 40 C.F.R. Section 307.32(e). Those requirements shall include but not necessarily be limited to the following procedures.

A. Waste Management will develop and implement procedures which provide for adequate public notice of solicitations for offers or bids on contracts. Solicitations must include evaluation methods and criteria for contractor selection. Waste Management shall notify EPA of the qualifications of all contractors and principal subcontractors hired to perform preauthorized response actions pursuant to the Consent Decree, Section VI (Performance of the Work By Waste Management). EPA shall have the right to disapprove the selection of any contractor or subcontractor selected by Waste Management. EPA shall provide written notice to Waste Management of the reasons for any such disapproval.

B. Waste Management will develop and implement procedures for procurement transactions which provide maximum open and free competition; do not unduly restrict or eliminate competition; and provide for the award of construction contracts to the lowest, responsive, responsible bidder, where the selection can be made principally on the basis of price. 40 C.F.R. Section 307.21(e). Waste Management and its contractors shall use free and open competition for all supplies, services and construction with respect to the Work performed at the Site. There are a number of ways that Waste Management can meet these requirements including but not limited to the following:

1. For example, if Waste Management awards a fixed price contract to a prime contractor, Waste Management has satisfied the requirement of open and free competition with regard to any subcontracts awarded within the scope of the prime contract.

2. Waste Management is not required to comply with the Federal procurement requirements found at 40 CFR Part 33 or EPA's Guidance on State Procurement Under Remedial Cooperative Agreements (OSWER Directive 9375.1-11, June 1988), in meeting these requirements. However, Waste Management shall be guided by these documents in developing procurement procedures for small purchases, formal advertising, competitive negotiations and noncompetitive negotiations as each may be appropriate to remedying the release or threat of release at the Site.

3. With reference to small purchase procedures, EPA defines small purchase procedures as those relatively simple, informal procurement methods for securing services, supplies and other property from an adequate number of qualified sources in instances in which the services, supplies and other property being purchased constitute a discrete procurement transaction and do not cost more than a certain amount in the aggregate (Example: \$25,000). Waste Management can meet the requirements of maximum free and open competition through small purchase procedures. Waste Management shall be guided by 40 CFR Part 33 or EPA's Guidance on State Procurement Under Remedial Cooperative Agreements (OSWER Directive 9375.1-11, June 1988) in developing such small purchase procedures. However, Waste Management shall in no event divide procurement transactions into smaller parts to circumvent other requirements of open and free competition.

C. Waste Management shall develop and implement procedures to:

1. Settle and satisfactorily resolve all contractual and administrative matters arising out of agreements to perform preauthorized response actions, in accordance with sound business judgment and good administrative practice as required by 40 C.F.R. Section 307.32(e); and

2. Issue invitations for bids or requests for proposals, select contractors, approve subcontractors and administer subcontracts in accordance with all terms,

conditions and specifications of contracts, manage change orders and contractor claims in a manner to minimize such actions, and resolve protests, claims, and other procurement related disputes.

D. Waste Management shall develop and implement a change order management policy and procedure generally in accordance with EPA's guidance on State Procurement Under Remedial Cooperative Agreements (OSWER Directive 9375.1-11, June 1988).

E. Waste Management shall develop and implement a financial management system that consistently applies generally accepted accounting principles and practices and includes an accurate, current, and complete accounting of all financial transactions for the project, complete with supporting documents, and a systematic method to resolve audit findings and recommendations.

F. Waste Management developed and submitted to EPA an acceptable Project Delivery Strategy to address the management approach for implementing the Remedial Action, including but not limited to procurement methods and contracting strategy.

G. As required in Section VI. of the Consent Decree, Performance of Work by Settling Defendants, Waste Management shall develop and submit to EPA a Work Plan addressing the Work Components in the ROD, how these components are to be implemented and coordinated with EPA. This Plan shall include an identification of key project management personnel, complete with roles, responsibilities and lines of authority (financial and decisional), and an organizational chart.

H. Modification of Remedial Design/Remedial Action elements or performance requirements contained in the Consent Decree or the final Remedial Design/Remedial Action shall require approval by the EPA Regional Administrator or his/her designee. Such modifications, when approved by the Regional Administrator in accordance with Agency procedures, shall modify this PDD.

VI. CLAIMS PROCEDURES

A. Pursuant to section 111(a)(2) of CERCLA, EPA may reimburse necessary response costs incurred as a result of carrying out the NCP that satisfy the requirements of 40 C.F.R. Section 307.21, subject to the following limitations:

1. Costs may be reimbursed only if incurred after the date of the original preauthorization;

2. Costs incurred for long-term operation and maintenance are not eligible for reimbursement from the Superfund; and

3. Section VI, Paragraph 11, of the Consent Decree, Performance of Work by Waste Management, requires that Waste Management develop and submit an Operation and Maintenance (O&M) Plan to EPA. The costs associated with developing this Plan, as well as, activities included within the Plan and costs associated with O&M activities are ineligible for reimbursement from the Fund.

B. In submitting claims to the Superfund, Waste Management shall:

1. Document that response activities were preauthorized by EPA;
2. Substantiate all claimed costs through an adequate financial management system that consistently applies generally accepted accounting principles and practices and includes an accurate, current and complete accounting of all financial transactions for the project, complete with supporting documents, and a systematic method to resolve audit findings and recommendations; and
3. Document that all claimed costs were eligible for reimbursement, consistent with applicable requirements of 40 C.F.R. Part 307.

C. Claims may be submitted against the Fund by Waste Management only while Waste Management is in compliance with the terms of the Consent Decree and no more frequently than upon:

1. Approval of the Remedial Design;
2. Completion of the Landfill Remedial Component;
3. Completion of the Groundwater Study Component (or approval of FFS); and
4. Completion of any additional eligible activities.

VII. OTHER CONSIDERATIONS

A. This PDD is intended to benefit only Waste Management and EPA. It extends no benefit to nor creates any right in any third party.

B. If any material statement or representation made in the Application for Preauthorization is false, misleading, misrepresented, or misstated and EPA relied upon such statement in making its decision, the preauthorization by EPA may be withdrawn following written notice to Waste Management. Disputes arising out of EPA's determination to withdraw its preauthorization shall be governed by Section XVII. (Claims Against the Superfund) of the Consent Decree. Criminal and other penalties may apply as specified in 40 C.F.R. Section 307.15.

D. The Fund's obligation in the event of failure of the Remedial Action shall be governed by 40 C.F.R. Section 307.42. EPA may require Waste Management to

submit any additional appropriate information needed to determine whether the actions taken were in conformance with the Consent Decree and the Performance of the Work, and were reasonable and necessary.

E. This preauthorization shall be effective as of the date of lodging of the Consent Decree.

Stephen D. Luftig, Director
Office of Emergency & Remedial
Response

Date

